

**IN THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA
CIVIL DIVISION**

MARY LOU SMITH
an individual, and
SHARON DENSON,
an individual

Plaintiffs,

vs.

CASE NO.: 08 CA 11315
Division B

TRAILER ESTATES PARK AND
RECREATION DISTRICT,
an independent special taxing district,
JANET JONES, an individual,
JOHN VANDERMOLEN, an individual,
JOSEPH SALERNO, an individual, and
MARY LOU MCNULTY, an individual,

Defendants.

PLAINTIFFS' MOTION TO STRIKE
AFFIRMATIVE DEFENSES OF DEFENDANTS

COMES NOW, Plaintiffs MARY LOU SMITH and SHARON DENSON (hereinafter referred to as "Plaintiffs") by and through their undersigned counsel and pursuant to Rule 1.140(f), Florida Rules of Civil Procedure, and move to Strike Affirmative Defenses of Defendants, Trailer Estates Park and Recreation District (the "District"), Janet Jones ("Jones"), John Vander Molen ("Vander Molen"), Joseph Salerno ("Salerno"), and Mary Lou McNulty ("McNulty"). The District has raised sixteen affirmative defenses in its Answer and Affirmative Defenses to the Plaintiffs' Third Amended Complaint (the "District Answer"). Janet Jones raised nine affirmative defenses in her Answer and Affirmative Defenses ("Jones Answer"),

Vander Molen raised six affirmative defenses in his Answer and Affirmative Defenses (“Vander Molen Answer”), Salerno raised four affirmative defenses in his Answer and Affirmative Defenses (“Salerno Answer”), and McNulty raised four affirmative defenses in her Answer and Affirmative Defenses (“McNulty Answer”), all of which were filed in response to the Plaintiffs’ Third Amended Complaint. For the reasons set forth below, the Plaintiffs move the Court for an order striking the specified affirmative defenses from the Defendants’ Answers.

1. Under Rule 1.140(f), Florida Rules of Civil Procedure, a party may move to strike redundant, immaterial, impertinent, or scandalous material from any pleading at any time. A motion to strike matters from the pleadings as redundant, immaterial, or scandalous should only be granted if the material is wholly irrelevant, and can have no bearing on the equities and no influence on the decision. *See Rice-Lamar v. City of Fort Lauderdale*, 853 So.2d 1125, 1133-34 (Fla. 4th DCA 2003); *McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So.2d 214, 216 (Fla. 2d DCA 1998).

2. A motion to strike is the appropriate method for a party to seek to strike an inappropriately pled affirmative defense. *See Con-Dev of Vero Beach, Inc. v. Casano*, 272 So. 2d 203 (Fla. 4th DCA 1973).

3. An affirmative defense is one that admits the cause of action asserted by the preceding pleading, but asserts an avoidance of liability by allegations of excuse, justification or other matters negating liability. *See Florida East Coast Railway Company v. Peters*, 72 Fla. 311 (1916); *see also, Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432 (Fla. 2d DCA 1965). A mere denial of the facts opposing a party’s claim is not an affirmative defense. *See Wiggins v. Portmay Corp.*, 430 So.2d 541, 542 (Fla. 1st DCA 1983); *Gatt v. Keyes Corp.*, 446 So.2d 211, 212 (Fla. 3d DCA 1984); *Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432 (Fla. 2d DCA

1965). Affirmative defenses must raise some new matter which will defeat or avoid an otherwise apparently valid claim. *See Wiggins* at 542.

4. Rule 1.110(d), Florida Rules of Civil Procedure, sets forth the applicable affirmative defenses that may be affirmatively asserted by a party responding to a pleading as follows:

accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

5. While the list of affirmative defenses in Rule 1.110(d), Florida Rules of Civil Procedure, is inclusive, a denial of the allegations is not an affirmative defense. *See Tropical Exterminators* at 432.

6. Most of the affirmative defenses raised by the Defendants are not appropriate affirmative defenses, but instead are mere denials or defenses to the causes of actions asserted by the Plaintiffs. Further, several of the affirmative defenses raised by the Defendants are not recognized under the law. The Third Amended Complaint alleges violations of the Sunshine Law and Public Records Law to which several affirmative defenses alleged by the Defendants though included on the list in Rule 1.110(d), Florida Rules of Civil Procedure, are nevertheless irrelevant as a defense to these claims.

7. The District's first affirmative defense is that the Plaintiffs claims for equitable relief are barred under the doctrine of unclean hands. While the Plaintiffs reject any allegations of bad motives or improper delay on their part, regardless, the intent of the Plaintiffs is irrelevant to a determination of whether violations of the Sunshine Law and Public Records Law have occurred. The Sunshine Law was enacted "so as to permit any citizen to vindicate the public's

interest in open government.” *Silver Express Co. v. District Bd. of Lower Tribunal Trustees of Miami-Dade Community College*, 691 So. 2d 1099, 1101 (Fla. 3d DCA 1997) (emphasis supplied). Therefore, a party’s motives in bringing an action for relief under the Sunshine Law may not be considered and are, as a matter of law, irrelevant. *See News-Press Publishing Co., Inc. v. Gadd*, 388 So. 2d 276, 278 (Fla. 2d DCA 1980). Also, an “individual’s reason for requesting a public record is irrelevant.” *City of St. Petersburg v. Romine*, 719 So. 2d 19, 21 (Fla. 2d DCA 1998). Further, the statements asserted within this defense are not an avoidance of the causes of actions against the District and this entire defense is immaterial, impertinent and scandalous. This defense is nothing more than an attempt by the District to prejudice the Court against the Plaintiffs and accordingly should be stricken from the District’s Answer. Similarly, Jones’ sixth affirmative defense is that the Plaintiffs are equitably estopped from complaining about Jones’ conduct due to “unclean hands”, which should also be stricken for the same reasons. In addition, Vander Molen’s first affirmative defense is that the Plaintiffs’ action is “barred by unclean hands and failure to act in good faith and is unnecessary by passage of time.” Stated as a combination in this fashion, this is not an affirmative defense recognized by law and should also be stricken on these grounds and for the other reasons stated herein.

8. The District’s second affirmative defense is that the Plaintiffs have failed to perform each condition precedent to seeking the relief requested in the Third Amended Complaint. This affirmative defense should be stricken from the District’s Answer on the grounds that the Plaintiffs have satisfied each condition precedent for the relief sought in the Third Amended Complaint. In particular, the District alleges that the Plaintiffs failed to present the claim in writing to the District as required by Section 768.28(6), Florida Statutes, and post a cost bond as required under Section 57.011, Florida Statutes. Section 768.28(6), Florida

Statutes, is only applicable to tort claims brought against certain governmental entities and therefore irrelevant to this case which involves alleged violations of the Sunshine Law and Public Records Law. In addition, pursuant to Section 57.011, Florida Statutes, the Plaintiffs filed their non-resident cost bonds with the Court on May 5, 2009. Accordingly, this affirmative defense is immaterial and impertinent, and must be stricken. It is assumed that Vander Molen's second affirmative defense is the same as the District's second affirmative defense (Vander Molen's Answer actually referenced Section 768.26(6), which does not exist in the Florida Statutes) and should be stricken from Vander Molen's Answer for the reasons already stated.

9. The District's third affirmative defense is that the Plaintiffs have failed to state an action for declaratory relief. This affirmative defense should be stricken because it is not an affirmative defense pursuant to Rule 1.110(d), Florida Rules of Civil Procedure, and fails to assert an avoidance of liability by the District. In addition, the District has improperly used this affirmative defense as a mechanism to circumvent the Court's Order directing the Defendants not to file any motions to dismiss directed at the Plaintiffs' Third Amended Complaint. Therefore, this affirmative defense is immaterial and impertinent, and must be stricken. Vander Molen's third affirmative defense is the same as the District's third affirmative defense and should be stricken from Vander Molen's Answer for the reasons already stated. Further, the District has also inappropriately used this affirmative defense as a motion for more definite statement directed at the Plaintiffs' Third Amended Complaint in violation of the Court's Order.

10. The District's fourth affirmative defense is that the Plaintiffs have failed to state an action for mandamus. This affirmative defense should be stricken because this is not an affirmative defense pursuant to Rule 1.110(d), Florida Rules of Civil Procedure, and does not assert an avoidance of liability by the District. In addition, the District has improperly used this

affirmative defense as a mechanism to circumvent the Court's Order directing the Defendants not to file any motions to dismiss directed at the Plaintiffs' Third Amended Complaint. Therefore, this affirmative defense is immaterial and impertinent, and must be stricken. Vander Molen's fourth affirmative defense is the same as the District's fourth affirmative defense and should be stricken from Vander Molen's Answer for the same reasons already stated.

11. The District's fifth affirmative defense is that the Plaintiffs have failed to perform each condition precedent to obtaining mandamus relief including the issuance of an alternative Writ of Mandamus. This affirmative defense should be stricken from the District's Answer on the grounds that the Plaintiffs have satisfied each condition precedent to obtaining mandamus relief that is within their control. More specifically, the issuance of an alternative Writ of Mandamus is in the Court's hands and not a condition precedent for the Plaintiffs to satisfy in bringing this action. Therefore, this affirmative defense is immaterial and impertinent, and must be stricken.

12. The District's sixth affirmative defense is that any alleged violations of the Sunshine Law or Public Records Law prior to the District being represented by Kirk-Pinkerton, P.A., was pursuant to the advice of legal counsel. This affirmative defense should be stricken from the District's Answer. The only potentially relevant aspect of this affirmative defense is as to the Court's ability to assess attorney's fees against the individual members of the District's Board of Trustees for alleged violations of the Sunshine Law as provided for under Section 286.011(4), Florida Statutes. Under no circumstances is this an affirmative defense that can be asserted by the District and therefore, it should be stricken as immaterial and impertinent.

13. Similarly, McNulty's second affirmative defense is that "(a)ny meetings of Trailer Estates' boards or committees at which Defendant McNulty attended or participated which were not noticed were held upon the advice or concurrence of District's legal counsel." This affirmative defense should be stricken from McNulty's Answer as it is not an affirmative defense recognized by law nor does it assert an avoidance of liability, but is only relevant to the Court's ability to assess attorney's fees against Defendant McNulty as an individual member of the District's Board of Trustees for the alleged violations of the Sunshine Law as provided for under Section 286.011(4), Florida Statutes. Accordingly, this affirmative defense is immaterial and impertinent, and must be stricken. Alternatively, this affirmative defense should be limited with regard to McNulty's potential avoidance of personal liability for attorney's fees as to Sunshine Law violations.

14. The District's seventh affirmative defense is that any meetings or discussions between two or more members of the District's Board of Trustees regarding District matters concerned only administrative matters of the District which are not subject to the Sunshine Law. This affirmative defense does not properly assert an avoidance of liability by alleging excuse or justification as it is merely a denial of the allegations in the Plaintiffs' Third Amended Complaint pertaining to Sunshine Law violations. Further, this is not an affirmative defense recognized by law. In addition, the District has already answered and denied allegations to the Plaintiffs' Third Amended Complaint and, therefore, this purported "affirmative defense" should be stricken as redundant, immaterial, and impertinent from the District's Answer. Jones' first affirmative defense, Vander Molen's fifth affirmative defense and Salerno's second affirmative defense are the same as the District's seventh affirmative defense and therefore these affirmative defenses

should be stricken from Jones' Answer, Vander Molen's Answer and Salerno's Answer respectively for these same reasons.

15. The District's eight affirmative defense and Jones' eighth affirmative defense appear to assert a statute of limitations affirmative defense alleging that the causes of action and recovery sought did not occur within the time prescribed by law to bring the claims. The District and Jones did not plead any allegations with specificity to clarify how this affirmative defense is applicable. This affirmative defense should be stricken from the District's and Jones' Answer since the violations asserted in the Third Amended Complaint are based on statutory violations of the Sunshine law (Florida Statutes § 286.011, *et. seq.*) and Florida's Public Records laws (Florida Statutes § 119.01, *et seq.*). The violations alleged in detail by the Plaintiffs in Counts I through IV under these statutes have occurred no more than three years prior to the filing of the initial Complaint on November 26, 2008. Section 95.11(3)(f), Florida Statutes, provides that actions founded on statutory liability shall be commenced within four years. Accordingly, this affirmative defense cannot be maintained by the District and Defendant Jones and therefore, it should be stricken as immaterial and impertinent.

16. In the District's ninth affirmative defense, the District has confused and muddled affirmative defenses and attempted to re-assert its laches affirmative defense that is pled in its tenth affirmative defense, as a "waiver and estoppel" affirmative defense. However, the facts asserted by the District in this affirmative defense allege that the Plaintiffs' claim is barred by their purported "undue delay" in bringing their claims. Mere delay is insufficient to support a defense of waiver or estoppel. *See Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So. 2d 1098, 1104 (Fla. 5th DCA 2006). "Laches" is the equitable doctrine that is applied to bar a claim at equity based upon unreasonable delay that under the circumstances is prejudicial to the adverse

party. *Miami-Dade Co. v. Fernandez*, 905 So. 2d 213, 216 (Fla. 3d DCA 2005). Accordingly, this affirmative defense is duplicative of the District's tenth affirmative defense and should be stricken as redundant, immaterial, and impertinent.

17. The District's eleventh affirmative defense is that the Plaintiffs lack standing to bring a claim based upon the public records requests made by others, which should be stricken from the District's Answer because this is not an affirmative defense pursuant to Rule 1.110(d), Florida Rules of Civil Procedure, and does not assert an avoidance of liability by the District. First, under Chapter 119, Florida Statutes, there is no standing limitation as expressed by the District in this affirmative defense. In addition, Section 119.07(1)(a), Florida Statutes, specifies that "(e)very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so" and failure to comply with the Public Records Law will subject the violating agency to a civil action to enforce the terms of Chapter 119, Florida Statutes. Further, the Defendants' failure to comply with the public records requests of persons other than the Plaintiff is evidence of the Defendants' "pattern and practice" of violating the Public Records Law and is therefore relevant and actionable.

18. The District's twelfth affirmative defense that declaratory or injunctive relief is not the Plaintiffs' proper remedy is not an affirmative defense but a defense. The affirmative defense is not one of the affirmative defenses listed in Rule 1.110, Florida Rules of Civil Procedure, nor does it constitute an avoidance of the District's obligations under the Sunshine and Public Records Laws. Further, the District has improperly used this affirmative defense as another attempt to circumvent the Court's Order directing the Defendants not to file any motions to dismiss directed at the Plaintiffs' Third Amended Complaint. The District has already

answered and denied allegations to the Third Amended Complaint and, therefore, this purported “affirmative defense” should be stricken as redundant, immaterial, and impertinent.

19. The District’s thirteenth affirmative defense is that any Sunshine Law violations were “subsequently cured by consideration of the issue at a subsequent properly noticed and conducted public hearing.” Only where a governmental entity has taken independent action to correct the violation, publically reconvening “in the sunshine” to conduct a full, open hearing on the same matters that gave rise to the violation, is there a cure for a Sunshine Law violation. *Port Everglades Auth. v. Int’l Longshoremen’s Ass’n, Local 1922-1*, 652 So. 2d 1169, 1171 (Fla. 4th DCA 1995) (citing *Tolar v. School Bd. of Liberty County*, 398 So. 2d 427 (Fla. 1981)). Further, where a violation is cured during the pendency of litigation, the party bringing the action still has the right to recover her attorneys’ fees and costs. *See e.g., Soud v. Kendale, Inc.*, 788 So. 2d 1051 (Fla. 1st DCA 2001) (holding that a request for attorney’s fees pursuant to the statute allowing attorneys’ fees when a defendant violates the Sunshine Act is a collateral legal consequence that is an exception to dismissal based on mootness). The District has failed to assert with any specificity that the Sunshine Law violations set forth in the Plaintiffs’ Third Amended Complaint were cured prior to the initiation of the subject litigation; therefore, this affirmative defense should be stricken from the District’s Answer. In addition, this same affirmative defense has been raised by Jones, Vander Molen, Salerno, and McNulty, as their ninth, sixth, first, and third affirmative defenses, respectively. Accordingly, these affirmative defenses should be stricken from the individual Defendants’ respective Answers for those same reasons.

20. The District's fourteenth, fifteenth, and sixteenth affirmative defenses are not affirmative defenses but attempts to deny the causes of action set forth in the Plaintiffs' Third Amended Complaint. More specifically, the District alleged that the transcript from a certain District Board of Trustees meeting was exempt from public disclosure, that the District's public records custodian responded to all of the Plaintiffs' public records requests in good faith, and that the actions of any invalidly appointed Board or committee member "were otherwise valid as the exercise of *de facto* authority by those Board or committee members." The allegations pled by the District in these paragraphs are not included in the affirmative defenses listed in Rule 1.110, Florida Rules of Civil Procedure. The District has already answered and denied allegations to the Plaintiffs' Third Amended Complaint and, therefore, these purported "affirmative defenses" should be stricken as redundant, immaterial, and impertinent from the District's Answer.

21. Jones' second, third, and fourth affirmative defenses and Salerno's third and fourth affirmative defenses are not affirmative defenses attempts to deny the causes of action set forth in the Plaintiffs' Third Amended Complaint. More specifically, Jones and Salerno both allege that the "conversations" referenced by the Plaintiffs in their Third Amended Complaint did not involve matters "reasonably foreseeable to come before the Board/Committee" and were for information gathering and fact-finding purposes. In addition, Jones also alleged that these "conversations...occurred after Board action." These affirmative defenses do not properly assert an avoidance of liability by alleging excuse or justification, they are at best denials of the allegations in the Third Amended Complaint. Further, the allegations pled by Jones and Salerno in these paragraphs are not affirmative defenses listed in Rule 1.110, Florida Rules of Civil Procedure. In addition, Jones and Salerno have both already answered and denied allegations to the Plaintiffs' Third Amended Complaint and, therefore, these purported

“affirmative defenses” should be stricken as redundant, immaterial, and impertinent from Jones’ Answer and Salerno’s Answer.

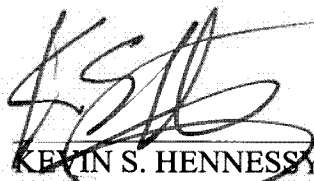
22. Jones’ seventh affirmative defense appears to assert a waiver or estoppel affirmative defense. The facts pled in this paragraph are unclear, however, it appears that Jones is asserting that the Plaintiffs have allegedly waived their ability to bring a claim for violations of the Sunshine Law because they may have “invited and advised” that certain meetings were not a Sunshine Law violation. To assert an affirmative defense of waiver a party must show: (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right. *See Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So. 2d 1098, 1104 (Fla. 5th DCA 2006). Estoppel is demonstrated by proving: (1) the party against whom estoppel is sought must have made a representation about a material fact that is contrary to a position it later asserts; (2) the party claiming estoppel must have relied on that representation; and (3) the party seeking estoppel must have changed his position to his detriment based on the representation and his reliance on it. *See id.* The burden of proving the affirmative defense of estoppel and waiver rests upon the party invoking it. *See id.* The facts as pled by Jones in her seventh affirmative defense do not satisfy the elements of waiver or estoppel under existing Florida law. Therefore, this purported “affirmative defense” should be stricken from Jones’ Answer.

23. McNulty’s first affirmative defense is that any records in her possession are duplicates of the record copies, which are in the possession of the custodian of records for the District. This is not an affirmative defense recognizable under the law and therefore it should be stricken from McNulty’s Answer.

24. McNulty's fourth affirmative defense is that she is no longer an elected official as of January 1, 2009, and that any violations alleged to have occurred after this date are beyond the scope of the Public Records and Sunshine Laws. This is a mere denial and not an affirmative defense admitting the causes of action asserted in the Plaintiffs' Third Amended Complaint. Further, all violations of the Public Records Law and Sunshine Law directed to McNulty are alleged to have occurred during the time she served on the District's Board of Trustees. Accordingly, McNulty's fourth affirmative defense is immaterial and irrelevant and should be stricken from McNulty's Answer.

WHEREFORE, as set forth herein, the Plaintiffs respectfully request that this Court enter an order striking the affirmative defenses raised by the Defendants Trailer Estates Park and Recreation District, Janet Jones, John Vander Molen, Joseph Salerno, and Mary Lou McNulty in their respective Answers, and grant such other and further relief as this Court deems to be reasonable and appropriate.

Respectfully submitted,



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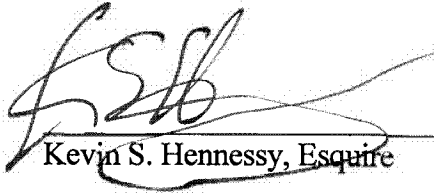
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished via U.S. mail to **Hunter Carroll, Esquire**, Matthews, Eastmoore, Hardy, Crauwels & Garcia, P.A., 1777 Main Street, Suite 500, Sarasota, FL 34236, **James D. Dye, Esquire**, Dye, Deitrich, Petruff, & St. Paul, 1111 Third Ave. West, Suite 300, Bradenton, FL 34205, **Robert E. Turffs, Esquire**, 1444 First Street, Suite B, Sarasota, FL 34236, **Daniel E. Scott, Esquire**, Daniel E. Scott, P.A., 2033 Main Street, Suite 408, Sarasota, FL 34237, **Thomas D. Shults, Esquire**, Kirk Pinkerton, P.A., 50 Central Avenue, Suite 700, Sarasota, FL 34236, this 11th day of September 2009.


Kevin S. Hennessy, Esquire